No. 87-771

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT PACIFIC POWER & LIGHT COMPANY'S BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether res judicata principles are applicable to an administrative decision on "a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case."

2. Whether the Court of Appeals for the District of Columbia Circuit was correct in affirming the Federal Energy Regulatory Commission's decision that there was no municipal preference in hydroelectric-project relicensings prior to passage of the Electric Consumers Protection Act of 1986.

3. Whether consideration of relative economic impacts in hydroelectric-project relicensing proceedings was mandated by the FERC's *City of Bountiful, Utah* decision, as well as subsequently being required by the Electric Consumers Protection Act of 1986.

PARTIES TO THE PROCEEDINGS BELOW

Respondent Pacific Power & Light Company is an investor-owned electric utility which serves retail electric customers in the states of Oregon, Washington, Idaho, Montana, Wyoming and California.* Pacific Power is the owner and operator of the Merwin Hydroelectric Project on the Lewis River in Washington State. Power from the Merwin Project is used to serve Pacific Power's customers' electricity needs.

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*"Pacific Power & Light Company" is an assumed business name for the electric operations of PacifiCorp, a Maine corporation. PacifiCorp has the following subsidiaries: PC/UP&L Merging Corp.; PACE Group, Inc.; Pacific Relocation Service Company; Wyopac Services, Inc. All of the following enterprises are affiliated with Pacific Power & Light Company as direct or indirect subsidiaries of Inner PacifiCorp, Inc., a wholly owned subsidiary of PacifiCorp: Astoria Development Corp.; Pacific Development (Lloyd Building), Inc.; Pacific Development (Lloyd 500), Inc.; Pacific Development (Lloyd General I), Inc.; Pacific Development (Lloyd General II), Inc.; Pacific Development (Lloyd Midrise), Inc.; Pacific Development (Lloyd Tower), Inc.; Pacific Development (Property), Inc.; NERCO, Inc.; PacifiCorp Credit, Inc.; Hyster Credit Corporation; Hyster Credit, Ltd.; PacifiCorp Business Credit, Inc.; PacifiCorp Capital, Inc.; PacifiCorp Leasing, Inc.; Systems Leasing Corporation (dba Municipal Leasing Corporation); Government Investment Associates, Inc.; Government Systems Advisors, Inc.; Government Systems Integration Corporation; Municipal Leasing Corporation; PacifiCorp Finance, Inc.; Northern Leasing Company, Inc.; PFI International, Inc.; PacifiCorp Trans, Inc.; Pacific Investment Enterprises, Inc.; Pacific Generation Services, Inc.; ONSITE Energy, Inc.; Pacific Resource Management, Inc.; Pacific Telecom, Inc.; Western Distribution Services, Inc.; Willamette Development Corp.; Alascom, Inc.; Bethel Cablevision, Inc.; Cascade Autovon Company; Cencom, Inc.; Cencom Leasing Co., Inc.; Cencom of Wisconsin, Inc.; International Communication Services, Inc.; Valley Video Systems, Inc.; Constant Broadcasting Company; Gem State Utilities Corporation; Eagle Telecommunications Inc./Colorado; Eagle Valley Communications Corporation; Inter Island Telephone Company, Inc.; MVI Corp.; MultiVisions, Inc.; MultiVisions, Ltd.; Northwestern Telephone Systems, Inc.; Pacific Telecom Nonregulated Holdings, Inc.; Associated P&C Engineers, Inc.; Audio Group, Inc.; CableBus Systems Corporation; Eyedentify, Inc.; Cardkey Systems, Inc.; Cardkey Systems, Ltd.; Sycor, Inc.; Flight Dynamics, Inc.; Arnav Systems, Inc.; Silver Instruments, Inc.; National Gateway Telecom, Inc.; FTC Communications, Inc.; UpSouth Corporation; Norcom Construction, Inc.; Pacific Telecom Construction Company; Ron Morris Corporation; Sertel, Inc.; Tel Com Construction Co.; Paccom Leasing Corporation; Pacific Telecom Cable, Inc.; PTI Alltelecom, Inc.; PTI Harbor Bay, Inc.; Shared Use Network Services, Inc.; T.U. International, Inc.; Pacific Telecom Service Company; Peninsula Telecommunications, Inc.; Peninsula Telecommunications Sales and Service; PTI Transponders, Inc.; Rose Valley Telephone Company; Telephone Utilities, Inc.; Telephone Utilities of Alaska, Inc.; Telephone Utilities of Eastern Oregon, Inc.; Telephone Utilities of the Northland, Inc.; Telephone Utilities of Oregon, Inc.; Telephone Utilities of Washington, Inc.;

(footnote continues)

The original federal license for the Merwin Project expired in 1978, and Pacific Power's application for relicense triggered the proceedings before the Federal Energy Regulatory Commission. A list of the parties in the Court of Appeals appears at p. ii of the Petition for Writ of Certiorari filed by the Clark-Cowlitz Joint Operating Agency.

(footnote continued)

Telephone Utilities of Wyoming, Inc.; Western Services, Inc.; NERCO Advanced Materials, Inc.; Spectrum Technology, Inc.; NERCO Coal Corp.; Antelope Coal Company; Associates Mining Company; Glenrock Coal Company; NDG, Inc.; NERCO Coal International, Inc.; NERCO Coal Sales Company; NERCO Eastern Coal Company; NERCO Energy Services Company; NERCO Eurosales, Inc.; MITNER Joint Venture; Northern Coal Transportation Company; P-V Mining Company, Inc.; Pacific Minerals, Inc.; Bridger Coal Company (a joint venture); Prospect Land and Development Company, Inc.; Resource Development Co., Inc.; Sequatchie Valley Coal Corporation; Spring Creek Coal Company; Western Minerals, Inc.; Decker Coal Company (a joint venture); NERCO Minerals Company; IBEX Mining Company; NEDCO, Inc.; NERCO DeLamar Company; NERCO Metals, Inc.; Alligator Ridge Joint Venture; NERCO Minerals — Canada, Ltd.; NERCO Con-Mine, Ltd.; Resource Associates of Alaska, Inc.; Taylor Joint Venture; NERCO Oil & Gas, Inc.; Clements Energy, Inc.; Clements Production Company.

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REASONS FOR DENYING THE WRIT

A petitioner's disappointment is not a sufficient basis for issuance of a writ of certiorari; required are issues of substance, merit and importance which may lead to decisions of possible consequence. Here, however, Petitioner Clark-Cowlitz Joint Operating Agency ("CCJOA"), which consists of two substantial, operating Washington public utility districts that enjoy preference access to the vast federal Columbia River hydroelectric resources,[1] can raise no such important issues. This is primarily the result of passage of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986), which clarified

[1] Virtually *all* of the power consumed by CCJOA's retail customers comes from hydroelectric resources, while most of Respondent Pacific Power & Light Company's ("Pacific Power") generation comes from much more expensive thermal resources. As a consequence, CCJOA's retail electric rates are substantially lower than Pacific Power's.

the municipal-preference-on-relicensing issue by prohibiting such a preference. Passage of that legislation eliminated much of the significance of this controversy. As a result, instead of being able to claim that the judicial resolution of this controversy will have wide-ranging impacts, CCJOA's Petition merely mirrors disappointed expectations. CCJOA is disappointed because it has been prevented from usurping very valuable existing hydroelectric resources belonging to its competitor, Pacific Power, at *depreciated, original-cost* prices.[2] Once again, however, disappointment is not a sufficient basis for issuance of a writ of certiorari.

CCJOA advances three claims: (1) that the en banc opinion below erroneously failed to give res judicata effect to a prior Federal Energy Regulatory Commission ("FERC" or "Commission") interpretation of statute, *City of Bountiful, Utah*, 11 F.E.R.C. (CCH) ¶61,337 (1980) ("*Bountiful*"); (2) that the FERC's decision renewing the existing license for the Merwin Project, *Pacific Power & Light Co.*, 25 F.E.R.C. (CCH) ¶61,052 (1983) ("*Merwin*"), erroneously determined that there is no preference in favor of municipalities such as CCJOA in relicensing proceedings; and (3) that, notwithstanding CCJOA's insistence of res judicata effect for *Bountiful*, this Court should ignore that portion of *Bountiful* that required consideration of relative economic impacts upon competing applicants. Not one of CCJOA's three arguments has any merit: The first is based upon the false notion that res judicata principles arise when pure questions of law are involved; the second overlooks both that *Bountiful's* conclusion was itself an aberration and that the judiciary should defer to an agency's interpretation of its own statute (even when that interpretation is inconsistent with a prior interpretation); and the third is nothing more than a plea that this Court withhold from Pacific Power the benefits of res judicata CCJOA attempts to claim for itself. CCJOA's Petition does not warrant serious consideration.

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[2]This is most clearly evidenced by CCJOA's footnote 6, where it bemoans the fact that unless this Court takes action it will "be left empty-handed and minus the substantial monies it has expended" in the attempted usurpation. Nowhere does CCJOA even acknowledge that its takeover of Merwin Dam at depreciated original cost prices would inflict far higher penalties upon Pacific Power's retail customers than the benefits CCJOA's customers would gain from the acquisition.

I. RES JUDICATA PRINCIPLES ARE NOT APPLICABLE TO AN ADMINISTRATIVE DECISION ON "A PURELY LEGAL ISSUE, A QUESTION OF STATUTORY CONSTRUCTION WHICH IN NO WAY HINGES UPON THE FACTS OF A PARTICULAR CASE."

CCJOA first asserts that the opinion below, *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm'n*, 826 F.2d 1074 (D.C. Cir. 1987), erroneously failed to give res judicata effect to *Bountiful*, thereby violating the rule of *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) ("*Utah Construction*"). CCJOA Petition at 16. By its own terms, *Bountiful* involved solely the "resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case." *City of Bountiful*, No. EL78-43 (FERC May 3, 1979) (unpublished, quoted verbatim in CCJOA Petition at 6). In light of this procedural background, CCJOA's reliance upon *Utah Construction* is utterly misplaced, for *Utah Construction* held that res judicata principles arise only when the administrative agency makes determinations of *fact* in a *trial-type* setting:

> When an administrative agency is acting in a *judicial* capacity *and resolves disputed issues of fact* properly before it which the parties have had an adequate opportunity *to litigate*, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 422 (emphasis added). As if to contrast the setting of *Utah Construction* from the present situation, this Court stated:

> In [*Utah Construction*] the Board was acting in a *judicial* capacity when it considered the Pier Drilling and Shield Window claims, the *factual disputes* resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version *of the facts* and an opportunity to seek court review of any adverse *findings*. There is, therefore, neither need nor justification for a second *evidentiary* hearing on these matters already resolved as between these two parties.

Id. (emphasis added; footnote omitted). In contrast to *Utah Construction*, in *Bountiful* there were no witnesses, no testimony, no cross-

examination, no findings of fact, and no evidentiary record.[3] For this reason alone, *Bountiful* simply cannot be given preclusive effect.[4]

Other courts have applied the principle that res judicata is limited to determinations of fact, as opposed to law. For example, Judge Friendly in *Associated Industries of New York State, Inc. v. United States Department of Labor*, 487 F.2d 342 (2d Cir. 1973), noted that principles of res judicata can be applied only to facts actually litigated. After citing and quoting *Utah Construction*, Judge Friendly concluded that it would be improper to impose res judicata in a situation in which no hearing had been held, and only an irrelevant fact had been litigated. 487 F.2d at 350 n.10. In a second decision from the Second Circuit, *Delamater v. Schweiker*, 721 F.2d 50 (2d Cir. 1983), the panel in a *per curiam* decision held that a determination made in the absence of a trial-type hearing — testimony given under oath, subpoenaed evidence and cross-examination — could not be accorded res judicata effect. Finally, the Court of Appeals for the District of Columbia Circuit also has previously held that principles of preclusion should not be triggered when only abstract questions are involved. *Hollister Ranch Owners' Ass'n v. Federal Energy Regulatory Comm'n*, 759 F.2d 898 (D.C. Cir. 1985).

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[3]The lack of any of the attributes of trial-type procedures points out the impropriety of the City of Bountiful's styling its initial pleading as a request for a "declaratory order." In fact, the absence of facts requires the conclusion that the City of Bountiful was in fact requesting issuance of an interpretative rule under Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). *See Pickus v. United States Board of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974) (interpretative rule is an "administrative construction of a statutory provision on a question of law reviewable in courts"). The City of Bountiful's error, however, is not significant; as this Court pointed out in *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942), the particular label an agency places upon its activity is not conclusive; "it is the substance of what the Commission has purported to do, and has done which is decisive."

[4]In footnote 9 at page 15 of its Petition, the CCJOA cites four decisions. None is on point; all involve preclusive effect accorded to prior determinations of fact, as opposed to law. For example, in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), a state administrative tribunal's determination — that there was no factual basis for an allegation of discrimination — was held to preclude subsequent federal litigation. The factual nature of the decision is manifest; as this Court stated:

> Certainly the administrative nature of the *factfinding* process is not dispositive. In [*Utah Construction*] we held that, so long as opposing parties had an adequate opportunity to litigate *disputed issues of fact*, res judicata is properly applied to decisions of an administrative agency acting in a "judicial capacity."

Id. at 484 n.26 (emphasis added) (quoting *Utah Construction*, 384 U.S. at 422). And in *Hayfield Northern Railroad Co. v. Chicago & North Western Transportation Co.*, 467 U.S. 622 (1984), this Court held that *no* preclusive effect was to be accorded to an agency determination of value of property.

The Restatement (Second) of Judgments confirms that res judicata is limited to an administrative agency's determinations of fact. Section 83 provides:

> (1) Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.
>
> (2) An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata *only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:*
>
> (a) Adequate notice to *persons who are to be bound by the adjudication . . .;*
>
> (b) The right on behalf of a party *to present evidence* and legal argument in support of the party's contentions and fair opportunity to rebut *evidence* and argument by opposing parties;
>
> (c) A formulation of issues of law *and fact* in terms of the application of rules with respect to *specified parties concerning a specific transaction, situation, or status, or a specific series thereof;*
>
> (d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered . . . .

Restatement (Second) of Judgments § 83 (1982) (emphasis added).[5] For the foregoing reasons, it is clear that *Bountiful* simply cannot be accorded any preclusive effect.

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[5]The comments to the above-quoted section eliminate any possible doubt that res judicata effect should be withheld from "purely legal issues" considered in the absence of full, trial-type procedures. Comment b to Section 83 provides:

> In performing legislative and managerial functions, agencies are not necessarily required to use procedures having the formality of adjudication. . . . While adjudicative procedure therefore is necessary to yield an adjudication that is binding under the rules of res judicata, not all proceedings involving elements of such procedure constitute adjudication. For example, the right to present evidence and to cross-

(footnote continues)

II. THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT WAS CORRECT IN AFFIRMING FERC'S DECISION THAT THERE IS NO MUNICIPAL PREFERENCE ON RELICENSING.

In 1986, Congress resolved the question of municipal preference on relicensing once and for all by passing the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986). This legislation establishes clearly Congress's intent that preference not be accorded to municipalities such as CCJOA in relicensing situations. Therefore, the basic issue raised by CCJOA's Petition is the academic one of whether there was a municipal preference in relicensing matters prior to 1986. The better reasoning leads to a conclusion that, just as there is not now, there was not then such a preference.

Bountiful certainly was not the first time that the FERC or its predecessor, the Federal Power Commission ("FPC"), addressed the question of municipal preference on relicensing; in each of the *two* prior instances the determination was made that there is *no* such preference on relicensing. First, in 1968 the then-Chairman of the FPC informed Congres that, because there was no municipal preference on relicensing, Congress need not entertain legislation addressing that issue. *See Bountiful*, Appendix to Petition for Certiorari 329a, 360a-367a. Second, in 1976 an FPC Administrative Law Judge determined that there was no municipal preference on relicensing in a case involving an electric cooperative association. The ALJ's decision discussed the issue in depth, and concluded that both the statute on its face and the legislative history "make it abundantly clear that the preference provision does not apply in a competitive licensing proceeding against the original licensee." *Opinion No. 757; Opinion and Order Denying Eligibility for Municipal Preference*, 55 F.P.C. 1272, 1283 (1976) (ALJ Decision).[6]

(footnote continued)

> examine witnesses is accorded in certain types of rule-making proceedings and licensing proceedings. . . . If such procedural rights of themselves indicated that a proceeding was adjudicative in nature, many types of rule-making hearings could be accorded res judicata effects. However, these procedural attributes are not of themselves sufficient to define adjudication.

Of course, there were absolutely no trial-type procedures in the *Bountiful* proceeding; therefore, the Restatement (Second) of Judgments clearly would withhold any preclusive effect from *Bountiful*.

[6]That decision was abandoned by the full commission because it was not necessary to the limited issue raised by the case, *viz.*, whether rural electric cooperatives have preference on relicensing.

Judged in this historical perspective, it is *Bountiful*, and not *Merwin*, which is the aberration.

CCJOA's Petition urging this Court to overturn the FERC's determination that there is no municipal preference on relicensing conveniently overlooks the requirement that the judiciary give proper deference to agencies' interpretations of their own statutes. Indeed, this Court has sanctioned giving such deference even when that interpretation is inconsistent with a prior agency position. In *National Labor Relations Board v. Local 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351 (1978), this Court stated:

> An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.[7]

In sum, while the legislative history behind the question of municipal preference on relicensing before passage of the Electric Consumers Protection Act of 1986 is admittedly not crystal clear, the better logic as well as law support the *Merwin* opinion. The Commission has wrestled with this issue on four occasions, and on three of those four occasions it has determined that there is no such preference. Of course, Congress very recently has concurred. *Merwin* is both the most recent examination of the issue, as well as the most exhaustive. Moreover, *Merwin* deserves special weight because, unlike *Bountiful*, it arose in a specific, concrete fact situation; indeed, the facts developed in the Merwin Project hearings obviously brought home the absurd results which could obtain if *Bountiful*'s erroneous interpretation were allowed to survive. Therefore, because *Merwin* is a correct determination of law and because the opinion below correctly deferred to that interpretation, CCJOA's second allegation of error is not a sufficient basis for issuance of a writ of certiorari.

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[7]Prominent lower federal courts concur; the Court of Appeals for the District of Columbia Circuit has on other occasions explicitly endorsed the notion that agencies should be allowed to change their interpretations of statutes: "[A]n administrative agency is permitted to change its interpretation of a statute, especially where the prior interpretation is based on error, no matter how longstanding." *Chisholm v Federal Communications Comm'n*, 538 F.2d 349, 364 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *see also Phoenix Hydro Corp. v. Federal Energy Regulatory Comm'n*, 775 F.2d 1187, 1191 (D.C. Cir. 1985) ("An agency is entitled to change its interpretation of a statute.").

III. CONSIDERATION OF RELATIVE ECONOMIC IMPACTS WAS MANDATED BY *BOUNTIFUL* AND SUBSEQUENTLY BY THE ELECTRIC CONSUMERS PROTECTION ACT OF 1986.

CCJOA's Petition first argues that *Bountiful* should be given preclusive effect. Then CCJOA urges this Court to ignore *Bountiful's* requirement that relative economic impacts be considered in relicensing proceedings. CCJOA cannot have it both ways.

Bountiful held:

> To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as economic costs and benefits, the distribution of benefits of hydropower and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Bountiful, Appendix to Petition for Certiorari at 390a-391a. Pursuant to this directive, the parties to the *Merwin* hearings (including the FERC staff) developed in great detail the net economic harm which would result from transfer of the Merwin Project to CCJOA. For example, unrebutted testimony established that for every dollar of benefit to CCJOA's customers consequent to CCJOA takeover of the Merwin Project, Pacific Power's customers would lose from $3 to over $30, depending upon the circumstances and assumptions. Under no scenario was there anything even approaching a net economic benefit consequent to CCJOA transfer.[8] In view of this unchallenged record, it is not surprising that CCJOA belatedly urges this Court to overrule *Bountiful's* "economic impacts" test.[9]

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[8]The predominant cause of the net negative consequences of transfer is CCJOA's much lower cost of power; because Pacific Power does not have preference access to the vast federal Columbia River hydroelectric resources, its alternative costs of power are much higher than CCJOA's. Thus, Pacific Power's loss of Merwin Dam causes a greater detriment to Pacific Power's customers than CCJOA's gain of Merwin Dam causes its own customers to benefit. *See Merwin*, Appendix to Petition for Certiorari at 151a-163-a.

[9]Of course, if the Merwin Project relicensing were subject to the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986), it is clear that relative economic impacts upon the competing applicants would play a prominent role. This is because the requirement of an "economic impacts analysis" was folded into the "need for power" criterion of that act. *See* H.R. Rep. No. 934, 99th Cong., 132 Cong. Rec. H8776 (daily ed. Sept. 30, 1986); *see also* 132 Cong. Rec. H8951 (daily ed. Oct. 2, 1986) (remarks of Cong. Moorhead and Cong. Markey).

At best, CCJOA's request that this Court summarily reverse *Merwin* is an attempt to relitigate the "economic impacts" issue it lost in *Bountiful*. At worst, CCJOA's request is a damning admission that under no scenario can it demonstrate that the public interest supports CCJOA's takeover of the Merwin Project. Finally, it is indeed astonishing that CCJOA would so blithely abandon in the last part of its Petition the res judicata arguments it a few pages earlier so earnestly espoused.

CONCLUSION

CCJOA is simply disappointed that it has been prevented from usurping a very valuable hydroelectric generating resource at a very low price: depreciated original cost. Disappointment, however, is not sufficient to support issuance of a writ of certiorari. CCJOA has failed to raise any credible legal reason why the writ should issue. Accordingly, CCJOA's Petition should be denied.

Respectfully submitted,

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